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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 786

CAPITOL AIRWAYS, INC.,
Petitioner,

vs.

CIVIL AERONAUTICS BOARD,
Respondent.

BRIEF OF DELTA AIR LINES, INC. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Delta Air Lines, Inc. ("Delta"), an Intervenor below on the side of Respondent, the Civil Aeronautics Board (the "Board" or the "CAB"), prays that insofar as Question One is concerned, this Court will deny the Petition for Writ of Certiorari filed in No. 786 by Capitol Airways, Inc. ("Capitol"). The Petition seeks review of the judgment of the United States Court of Appeals for the Second Circuit entered in the above-entitled case on October 7, 1959.[1]

[1] Citations to the Opinion below will be to Appendix A of the Petition in No. 786, *e.g.*, "(A7)". Citations to statutory sections on occasion will include references to Appendix B of said Petition. References to material in the printed Joint Appendix will be by page number thereof, *e.g.*, "(J.A. 123)".

INTRODUCTORY STATEMENT

The Petition presents two questions for possible review by this Court. Only Question One affects Delta, and this Reply Brief therefore will discuss only those matters presented by the Petition in support of that one question. Delta expresses no opinion as to whether this Court should review the matters presented by Question Two, except that if a Writ of Certiorari is issued concerning the latter matter, to request that review be limited strictly to that Question.

COUNTERSTATEMENT OF CASE

Delta agrees that the CAB order of which complaint is made denied Capitol's application for a certificate of public convenience and necessity to operate between Miami and Chicago and between Miami and Detroit, and instead granted applications of other air carriers to provide such service (Petition, p. 3). Delta also agrees with Capitol's representation of its status at the time the Agency proceeding was commenced (*ibid.*), with its description of the route authority which it sought (*ibid.*), and with its description of Congressional appearances at Oral Argument before the Agency (Petition, pp. 3-4). Finally, Delta has no objection to Capitol's summary of the decision of the Court below (Petition, pp. 4-5).

Delta does, however, disagree with two of Capitol's statements. Capitol says that it proposed to operate "... a low-cost air coach service over these routes at fares about 26 percent below those being charged by the existing carriers" (Petition, p. 3). It is true that Capitol proposed nothing but coach-type service, but it is not entirely accurate to state that its proposed fares would have been about "26 percent below" existing fares. The percentage spread of which Capitol talks, was between its suggested 4¢-per-passenger-mile fare

for the *one and only* type of service which it proposed, and the *average yield* experienced by existing carriers from the wide variety of different services which they in fact did operate to serve the public fully.

Actually, as was pointed out to the Agency, Delta, for example—which, together with Eastern, long has served the Chicago-Miami route to which Capitol aspires—had been providing day coach service at a yield (1957) of 4.716¢ and night coach service at a yield (1957) of 4.188¢ per-revenue-passenger-mile (R. 15,760). Capitol's proposed coach service thus would not drastically have differed from the coach services already being provided although, like Delta's existing coach service, it would have been provided at a lower fare than existing first-class service.

More important, Delta disagrees with Capitol's statement that in the Board's decision, "No findings were made concerning Petitioner's fitness or the public need for the low-cost service which it proposed" (Petition, p. 4). This is not correct.

The Examiner and the Board clearly found that the services proposed by Capitol were not required in the public interest. Capitol, as it admits here (Petition, p. 3), actually proposed nothing except a coach-type service. Accordingly, the Examiner specifically found:

> "*Capitol Airways' proposal contemplates a coach-only service,* although it was *indicated* that regular fare schedules would be inaugurated *in the event* the carrier found, *after* experimental operation of the route, that such service was required . . ." (J.A. 908-909; emphasis added).

The Board's decision, however, was that *both* first-class and coach services were needed (J.A. 909 and 1331).

The findings to support this conclusion were not contained only in the sections of the initial and Board decisions wherein it was concluded that Capitol's proposal would not sufficiently satisfy public needs, but were set forth throughout both of those decisions.

For example, the Examiner devoted considerable discussion to evidence showing high load factors (percentages of seats filled) on previously-existing nonstop services in both the Chicago-Miami and Detroit-Miami markets (J.A. 883-886 and 896-899). This evidence, and the Examiner's findings based thereon, related to all the nonstop service, both first-class and coach (J.A. 899, footnote 35). On this basis, the Examiner concluded with respect to the Detroit-Miami market, for example, that ". . . under such conditions the public was not receiving a fully adequate service and . . . many prospective passengers were in all probability unable to secure reservations" (J.A. 896). In other words, they were unable to secure reservations on *both* first-class and coach services.

Similarly, the evidence submitted by the civic parties (for example, Toledo, J.A. 473-476) and the findings made with respect thereto (J.A. 909), related to the need of all types of travelers, coach *and* first-class.

After studying the voluminous evidence, the Board reached its finding that *both* types of service were needed. As the Examiner (whose findings in this respect were adopted by the Board—J.A. 1320) put it, with specific reference to Capitol's proposal:

> ". . . The findings made earlier herein were not restricted to the need for coach service only but were applicable as well to the need for additional regular fare service. . . ." (J.A. 909).

And in its Decision, the Board said, again with specific reference to Capitol:

> "... Our findings of a need for additional service in these markets is based on both first class and coach service needs which Delta and Northwest can provide ..." (J.A. 1331)

In view of these findings, it was concluded that Capitol's coach-only proposal would not fully meet the requirements of the public convenience and necessity which were found to exist, whereas proposals of others would do so (J.A. 909, 961, 1332 and 1376).

The Board nevertheless also considered whether Capitol's limited type of proposal should be granted in addition to applications by other carriers which more fully were in accord with the public needs. But the Board specifically found that such a grant of Capitol's application adversely would affect other carriers in the market, contrary to the public interest. The Board said:

> "... We have even considered an experimental authorization of Capitol's service, in addition to the other new services we are authorizing, but we are unable to find that the advantages of such an experiment outweigh the competitive impact on the other new services we are authorizing. For example, we do not believe the Chicago-Miami traffic, the largest market under consideration, could now support a fourth, albeit special and experimental, service without substantial adverse impact on the other competing carriers. Accordingly, Capitol's application will be denied" (Order E-13024, J.A. 1331-1332).

ARGUMENT

The Petition Does Not Present Sufficient Reason for This Court to Review the Matters Raised by Question One.

Question No. 1, as stated by Capitol:

> Whether, in an adjudicatory proceeding involving comparative fitness, Section 401(d)(1) of the Civil Aeronautics Act requires the Civil Aeronautics Board to make findings when it denies (as distinguished from when it grants) an application for a certificate of public convenience and necessity.

Capitol presents two reasons why it thinks this Court should grant it a further hearing on the matters raised by Question One. The main point is an alleged conflict between decisions of the Courts of Appeal concerning the proper construction of Section 401(d)(1) of the Civil Aeronautics Act[1] (Petition, pp. 8-9). A second point is that in any event the construction given to that Section by the Court below is wrong (Petition, pp. 6-7).

I. There Is No Conflict Between the Decision Below and Other Decisions

There is clearly no conflict, however, between the decision below and other decisions construing Section 401. In order fully to appreciate this fact, it must be understood that Capitol's characterization of the decision below on this point is incorrect.

Capitol says that the ". . . Court below held that *no findings whatsoever* are necessary in these circum-

[1] 49 U.S.C. 481 (now Section 401 of the Federal Aviation Act, 49 U.S.C. 1371), set forth in Appendix B to Capitol's Petition, pp. 15a-16a.

stances" concerning the denial of an application (Petition, p. 5; emphasis in original). The Court did not say that. It said:

> ". . . As we read this section [Section 401] it refers only to the findings necessary in order to grant a certificate; it does not purport to deal with situations where the Board has decided *not* to grant the certificate. Courts have previously held that where one of competitive applications is held preferable to the others from the standpoint of public interest, no *further* findings with respect to the unsuccessful applicants is required . . . The *findings* leading the Board to select Northwest and Delta *in preference to* Capitol are sufficient and are supported by substantial evidence" (A13a; footnote omitted; emphasis added in part).

The "circumstances" to which Capitol alludes obviously were important to the Court's decision. Capitol here was only one of a number of applicants for Chicago-Miami and Detroit-Miami route authority. What the Court was saying, then, was that in such a situation, because the statute does not specify the type of ultimate finding required in the case of denials, the findings which establish that the grant of one application is required by the public convenience and necessity, can also constitute the findings which justify denial of a competing, but less satisfactory proposal in the same proceeding.

It is apparent from the foregoing Counterstatement of Case that the Board's decision here does contain explicit discussion, fully adequate to a Court's understanding of the Board's rationale, concerning the type of service needed. These findings established that a carrier was needed which would operate *both* first-class

and coach service. Because Capitol had proposed only coach service, these same findings also established that its proposal would not satisfy the public needs, and that its application therefore should be denied and another, more satisfactory proposal granted. This perhaps would have been enough; but the Board also explicitly indicated in its opinion that it was exactly *because* its findings had shown a need for a type of service (first-class service) which Capitol did not propose, that Capitol's application was being denied (J.A. 1331).

This was what the Court below approved. The Court did *not* say that no findings at all are needed, but rather that the reasons and basis for a decision to grant one application can, as here, also constitute the reasons and basis for denying another, competing proposal in the same case. The Court was not laying down a rule for universal application, e.g., in a case where there is only *one* applicant whose proposal the Board finds must be denied. The Court was ruling upon a situation where there *were* ample findings on the major issue of which of the various types of services proposed by a number of applicants were required by the public convenience and necessity.

Capitol says that this decision by the Court below is in conflict with the opinion of the United States Court of Appeals for the District of Columbia Circuit in *Greensboro-High Point Airport Authority* v. *Civil Aeronautics Board* (D.C. Cir. 1956), 231 F. 2d 517. Capitol points to two specific holdings in that case (Petition, pp. 8-9):

(1) "The agency's findings must also be sufficiently definite to enable the courts to perform the task of judicial review" (231 F. 2d at 521); and

(2) "Despite these considerations, the fact remains that Greensboro has not received a plain answer to its charge of discrimination. We think it is entitled to one. The issue was flatly raised, and was relevant to the Board's ultimate decision as to what the public convenience and necessity required. The Board's failure to supply an answer was not harmless error, but prejudiced Greensboro's position in its efforts to obtain judicial review. We think the Board should now make appropriate findings of fact on the issue, and state 'the reasons or basis' for its conclusion" (231 F. 2d at 521-522).

There is clearly no inconsistency between the decision below and the first of the two above-quoted holdings of the District of Columbia Circuit. The Court below specifically recognized that the reasons for denial of Capitol's applications here lie in the reasons given by the Board for granting competing proposals, and that the latter reasons ". . . are sufficient and are supported by substantial evidence" (A13a). In other words, the Court below applied the very rule stated by the District of Columbia Circuit, and found that here the Board's findings *were* sufficiently definite to enable the Court to perform its task of judicial review.

Similarly, there is no inconsistency between the decision below and the second of the above holdings of the District of Columbia Circuit. In the first place, the *Greensboro Case* did not even purport to deal with the subject here involved, i.e., what type of findings, if any, are necessary to support a denial under Section 401 of an application for a certificate of public convenience and necessity. The *Greensboro Case* dealt only with the question whether the Board had ruled adequately upon the request of a civic intervenor that

a new certificate which was granted to a carrier applicant be worded in a certain way in order to prevent discrimination against the city.

More important, the reason for the District of Columbia Circuit's holding that Greensboro was to be given a "plain answer" to its charge of discrimination, was that neither the Examiner's initial decision nor the Board's decision in that case contained any explicit discussion of the point raised by Greensboro, so that the Board had failed to supply any answer at all (231 F. 2d at 521 and 522). The Board here clearly did supply a definite answer in denying Capitol's application for Chicago-Miami and Detroit-Miami route authority—i.e., that Capitol's application would not supply enough of the public services which had been found to be needed.

It is clear from the foregoing that there is no inconsistency between the decision below and that of the District of Columbia Circuit in the *Greensboro Case*. To the contrary, as the Court below pointed out, its decision accords with two holdings of the other Circuit, *Continental Southern Lines* v. *Civil Aeronautics Board* (D.C. Cir. 1952), 197 F. 2d 397, 402-403, *cert. den.* 344 U.S. 831, and *North American Airlines* v. *Civil Aeronautics Board* (D.C. Cir. 1957), 241 F. 2d 445, 448 A13a).

II. The Construction Given by the Court Below to Section 401(d)(1) of the Civil Aeronautics Act Is Not Erroneous

Capitol's whole argument concerning the alleged erroneous nature of the construction given by the Court below to Section 401(d)(1) (B15a-16a) turns upon Capitol's misunderstanding of the Court's holding. Capitol says that the question, which it alleges to

be of general interest (Petition, p. 16), is whether the phrase "otherwise such application shall be denied" in Section 401(d)(1) (B15a-16a), "requires that the Board make findings in cases where it *denies* an application" (Petition, p. 5). Leaping from that self-made springboard, Capitol conjures up a picture of dire consequences under the Civil Aeronautics Act and other statues containing similar language, if this Court should not review, and reverse, the alleged holding below that in denying an application the Board need make "no findings whatsoever" (Petition, p. 5).

But as seen above under Section I of this Argument, the Court below did *not* hold that the Board need make "no findings whatsoever." Moreover, the fact is that the Board *did* make findings (see Counterstatement of Case, *supra*) which the Court below held to be sufficient and to be supported by substantial evidence (A13a). Thus, the question is not the one put by Capitol. If any question is involved, it is whether the findings which the Board *did* make concerning the types of service needed by the public—findings which the Board specifically related to Capitol's proposals to provide only a *part* of those services (J.A. 1331), and which findings led the Board to grant competing, more satisfactory applications (*ibid.*)—were sufficient to support the Board's denial of Capitol's application.

Viewed in this light, the decision below clearly was proper. Capitol's only authority for contending otherwise is *Schaffer Transportation Company* v. *United States*, 355 U.S. 83 (1957), in which this Court reversed an Interstate Commerce Commission denial of an application for a motor carrier certificate. Insofar as the opinion reveals, Schaffer was the *only* applicant involved, not one of several applicants as Capitol was

here. The language in that case to which Capitol first points is the following:

> "Since the Commission has failed to evaluate the benefits that Schaffer's proposed service would provide the public, including whatever benefit may be determined to exist from the standpoint of rates, and since the findings as to the adequacy of rail service do not provide this Court with a basis for determining whether the Commission's decision comports with the National Transportation Policy, that decision must be set aside, and the Commission must proceed further in light of what we have said" (355 U.S. at 92-93).

To merely quote the language shows its inapplicability here. In the first place, as seen above, the Board here *did* evaluate the benefits that Capitol's proposed service would provide the public. The Board found that the benefits were insufficient to meet the needs, and thus was compelled to select another applicant whose proposal was more satisfactory. The Board even went further and considered the possibility of certificating Capitol in addition to the other carriers in the market, but concluded that this would be contrary to the public interest for reasons stated (J.A. 1331-1332).

In the second place, the *Schaffer* case apparently involved a single applicant, and thus the Commission's opinion could not do as the Board's opinion did here—i.e., make combined findings as to why the public interest required grant of one application rather than another. This Court in *Schaffer* was not dealing with the same problem which was presented to the Court below.

Furthermore, the problem in *Schaffer* was different for another reason. When this Court said, at 355 U.S.

92 that the Interstate Commerce Commission had ". . . failed to evaluate the benefits that Schaffer's proposed service would provide," it was talking about a specific duty imposed upon the Commission by the National Transportation Policy, 54 Stat. 899, 49 U.S.C. preceding § 1. The very cornerstone of the Court's opinion was the well-established duty of the Commission under that Policy to evaluate the "inherent advantages" of each of the several different modes of transportation under its regulation, so as to recognize and preserve each of them. In the *Schaffer* decision, the Court found that the Commission had failed completely to consider the "inherent advantages" of motor transportation such as Schaffer had proposed, including the ability of that type of transportation to provide lower rates than existing rail transportation, and thus had failed to discharge a specific statutory duty to make a certain type of comparative finding concerning different modes of transportation. *This* is what the Court meant when it said, ". . . the Commission has failed to evaluate the benefits that Schaffer's proposed service would provide the public, including whatever benefit may be determined to exist from the standpoint of rates" (*ibid.*). The Court meant nothing more, and was not laying down a rule for application to agencies which are not bound by the National Transportation Policy, *supra*.

The CAB, of course, is not subject to that Policy, and has regulatory power over only a *single* mode of transportation—aviation. Despite Capitol's effort (Petition, pp. 6-7) to draw a parallel between the National Transportation Policy and Section 2 of the Civil Aeronautics Act, 49 U.S.C. 402 (B15a), the plain fact is that the Board has no duty to consider and evaluate

the "inherent advantages" of one mode of transportation *as compared to another*, but only to consider the advantages of air transportation itself and to improve relations only between air carriers themselves. Thus, the charge cannot be made here that the Board's decision "would give one mode of transportation unwarranted protection from competition from others" (355 U.S. 91), yet that was the very basis of this Court's decision in the *Schaffer* case.

For the above reasons it is clear that the decision below is not in any respect inconsistent with the *Schaffer* case. The decision of the Court below has not been shown to be erroneous in any other respect.

CONCLUSION

It is clear from the foregoing that there is not involved here a decision rendered by the Court below which is in conflict with the decision of another Court of Appeals on the same matter, nor a decision which has ruled upon a federal question in a way which conflicts with applicable decisions of this Court. In point of fact, because of Capitol's misunderstanding of the decision below, the problem which Capitol is attempting to raise under Question One does not even exist. The problem assumed may be an interesting one, but that fact alone does not justify burdening this Court with consideration of it:

> "A federal question raised by a petitioner may be 'of substance' in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants . . ." (*Rice* v. *Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74 (1955))

Put differently, this Court does not sit to decide hypothetical or speculative questions. *Cf. United States* v. *Mayer*, 235 U.S. 55 (1914) and *Busby* v. *Electric Utilities Employees Union*, 323 U.S. 72 (1944).

Accordingly, Delta Air Lines, Inc. respectfully submits that a Writ of Certiorari should not issue with respect to Question One of the Petition for Certiorari in No. 786.

Respectfully submitted,

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